Case 10-CA-191492

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

PRUITTHEALTH VETERAN SERVICES-NORTH CAROLINA, INC.,
Respondent

and

RICKY EDWARD HENTZ, an Individual,

Petitioner

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Jana L. Korhonen, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
One Ninety One Peachtree Tower
191 Peachtree Street N.E. – Suite 4800
Atlanta, Georgia 30303
(404) 881-1300

Attorney for Respondent
PruittHealth Veteran Services-North Carolina, Inc.

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RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent PruittHealth Veteran Services-North Carolina, Inc. ("Respondent" or the "Veterans' Home"), by its undersigned counsel and pursuant to Rule 102.46 of the Board's Rules and Regulations, submits this brief in support of its contemporaneously-filed Exceptions to the decision of Administrative Law Judge ("ALJ") Keltner W. Locke dated May 4, 2018[1] filed in the above-captioned matter.

The ALJ's decision erroneously concludes that the Veterans' Home disciplined, demoted, and discharged Ricky Hentz ("Hentz") because he had engaged in concerted protected activities for employees' mutual aid or protection under Section 7 of the National Labor Relations Act ("NLRA"). The General Counsel claimed that, as the Veterans' Home's former Scheduler, Hentz had multiple work-related discussions with coworkers on matters pertaining to staffing and race-related matters. The evidence at the hearing failed to establish that any of the individuals with

[1] Citations to the Administrative Law Judge's original decision will be referenced as "ALJD" followed by the appropriate page and line numbers. References to the hearing transcript will be referenced as "Tr." followed by the appropriate page and line numbers.

whom Hentz reportedly discussed those work-related matters planned to take any action with respect to them. The General Counsel claimed that Hentz engaged in protected concerted activities under Section 7 of the NLRA by expressing concerns on behalf of employees including Rick Luce, Brandi Sigmund, Danielle Jeter, Linda Brinson, Marie Williams and others. Yet, notably absent from the hearing were Rick Luce, Brandi Sigmund, Danielle Jeter, Linda Brinson, Marie Williams and several others. Thus, those individuals did not provide any testimony as to what concerns they honestly and reasonably held during their employment or whether Hentz accurately represented their so-called concerns or whether they had any interest in him doing so. The ALJ erroneously assumed, without sufficient evidentiary proof and contrary to the preponderance of the evidence, that the statements made by Hentz about these individuals' so-called concerns were true. The ALJ's opinion was also based on legal error, because there was no evidence that any of the individuals with whom Hentz had discussions about staffing or race-related matters were planning on "doing or performing anything together or in cooperation"—a new standard for protected concerted activity that the Board should adopt in accordance with former Member Miscimarra's dissent in Fresh & Easy Neighborhood Market, Inc., 361 NLRB No. 12 [200 LRRM (BNA) 1401], 2014 WL 3919910, No. 28-CA-064411 (8/11/14). Instead, the conversations Hentz had with other employees about staffing or race-related matters were nothing beyond "mere talk." Thus, there was no group action. Nor was there truly any group complaint being raised. Instead, the evidence adduced at the hearing showed only that Hentz had raised various individual gripes during his employment.

The ALJ erroneously concluded that Hentz engaged in protected concerted activity based on a statement he made to Morrison to the effect of, "I feel like [former Activities Director] Amy [Ferguson] definitely treats African Americans differently than she do [sic] others, and I'm not the

only one. I've had that conversation with other people as well who felt like there definitely was a discrepancy in the way that she treated African Americans. I mean she was very standoffish and whatnot. And I told him I was going to corporate." The preponderance of the evidence, including the evidence offered by the General Counsel's own witnesses (Hentz included), shows that this statement was never made, and the ALJ made an erroneous credibility determination in concluding that it was.

The evidence adduced at the hearing also established that Hentz had, in fact, contacted PruittHealth's Corporate Office to complain that Ferguson had issued a reprimand to him for eating ice cream in a common area frequented by residents, which the Veterans' Home did not allow. Hentz claimed Ferguson's actions were based on race discrimination. The assigned investigator, Human Resources Business Partner Della Mervin, testified that when given the opportunity to discuss this matter with her, Hentz referred to other individuals who Mervin could talk with about their own experiences, but stated, "I'm here to talk about me." Inexplicably, the ALJ noted that Hentz did not take the stand to rebut Mervin's description of their conversation. The ALJ nonetheless discounted Mervin's uncontroverted description as being paraphrased. The ALJ also made the erroneous conclusion that Hentz contacted PruittHealth's Corporate Office to complain of alleged race discrimination *after* talking with two other employees: Linda Brinson and Danielle Jeter. Hentz, however, testified that he called PruittHealth's Corporate Office *before* he talked with Brinson and Jeter, meaning those discussions could not possibly have motivated him to raise his own individual gripe. Hentz could not recall when he spoke with another coworker (Marie Williams) about alleged discrimination. Regardless, once given the opportunity to discuss his grievance, he made clear to Mervin, "I'm here to talk about me." Thus, the ALJ's conclusion that Hentz engaged in protected concerted activities was unsupported by a preponderance of the

evidence and based on legal error. The ALJ further erred in failing to identify which instances of alleged protected activity Morrison knew of and, instead, presumably imputed knowledge to him of all such instances, contrary to established Board law. In any event, the preponderance of the evidence, including the evidence offered by the General Counsel's own witnesses, showed that Morrison did not know what was going on when PruittHealth's Corporate Office conducted an investigation, let alone that such matters were raised by Hentz and pertained to underlying matters ultimately within the scope of Section 7 of the NLRA (which they did not). For all those reasons, the ALJ's decision should be reversed and the allegations in Paragraphs 9-14 of the General Counsel's Complaint pertaining to the discipline, demotion, and termination of Hentz should be dismissed.

I. STATEMENT OF THE CASE

On May 30, 2017, the Acting Director of the National Labor Relations Board, Region 10, filed a Complaint against the Veterans' Home. The Complaint, issued under Section 10(b) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (the "Act") and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the "Board"), alleges the Veterans' Home violated the Act by interfering with, restraining, and coercing employees in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

The Complaint alleges that Respondent violated the Act when Justin Morrison, Administrator of the Veterans' Home, allegedly said, "This is my building and I'll do what the fuck I want" and "Stay in your lane." The Complaint alleges these statements pertained to staffing concerns and personnel issues, and that employees were separately advised not to discuss their wages amongst themselves. General Counsel ("GC") Exh. 1(e) (Compl.) ¶¶ 6-8. The Complaint further alleges that between October through December 2016, Ricky Hentz concertedly

complained to the Veterans' Home about concerns with race discrimination, staffing, and personnel issues and that he was disciplined, demoted and discharged. Id. ¶¶ 9-14.

A hearing took place in Asheville, North Carolina on September 12-14, 2017, before Administrative Law Judge Keltner Locke. No oral argument was held. On May 4, 2018, the ALJ issued his decision. The ALJ's decision erroneously concluded that Hentz had engaged in protected concerted activities for employees' mutual aid or protection within the meaning of Section 7 of the NLRA. The ALJ's opinion fails to analyze whether Morrison knew of alleged instances of protected activity upon which the General Counsel's claim is based and, instead, improperly imputed knowledge to him of presumably all such protected activity. The ALJ erred in concluding that Morrison knew that Hentz had engaged in any protected activity in connection with his call to PruittHealth's Corporate Office. The preponderance of the evidence, including the evidence offered by the General Counsel's own witnesses, established that Morrison did not know that investigation pertained to alleged race discrimination by former Activities Director Amy Ferguson, let alone that it pertained (because it did not) to any truly group complaints. The ALJ made numerous other improper conclusions and unsupported statements, of which the page limitations under the Board's Rules do not support a full response. For the reasons expressed in the accompanying Exceptions, and as stated below, the Veterans' Home respectfully requests that the ALJ's decision be reversed and the allegations in Paragraphs 9-14 of the General Counsel's Complaint pertaining to the discipline, demotion, and termination of Hentz be dismissed.

II. QUESTIONS PRESENTED WITH EXCEPTIONS

1. Whether the ALJ's finding that Hentz told Morrison that employees "believed there was racial prejudice in the workplace" is unsupported by the preponderance of the evidence. (ALJD p.

1, Section "Statement of the Case" (unnumbered lines; approximately lines 23-29 and p. 25, lines 24-30).). *See* Exception 1.

2. Whether the ALJ's finding that employees had concerns about staffing assignments that Hentz reported to "Hentz" [sic] is erroneous and a scribner's error? (ALJD p. 11, lines 4-6.) *See* Exception 2.
3. Whether the ALJ's finding that Hentz was engaged in protected, concerted activity when he reported employees' concerns about staffing assignments to "Hentz" [sic] is erroneous and a scribner's error? (ALJD p. 11, lines 4-6.) *See* Exception 3.
4. Whether the ALJ's implied finding that Rick Luce was concerned about staffing was based on an erroneous credibility determination and unsupported by the preponderance of the evidence. (ALJD p. 10, lines 13-14 and 30-35; p. 34, lines 1-42.) *See* Exception 4.
5. Whether the ALJ failed to make a necessary finding as to whether an alleged concern attributed to Rick Luce was "based on an honest and reasonable belief" in accordance with NLRB v. City Disposal Systems, 465 U.S. 822, 840 (1984), and other applicable authority. (ALJD pp. 17-21 and passim.) *See* Exception 5.
6. Whether the ALJ's conclusion that Hentz's reporting of employees' complaints to Morrison falls within the protections of Section 7 of the Act is contrary to NLRB case law and other authority and erroneous because the ALJ failed to address critical, credible and contradictory evidence the ALJ is obligated to consider and reconcile. (ALJD p. 11, lines 11-12 and 24-26.) *See* Exception 6.
7. Whether the ALJ's conclusion that Hentz brought group complaints to management's attention is erroneous because such finding is unsupported by the preponderance of the evidence. (ALJD p. 11, lines 11-12 and 17-18; lines 32-33.) *See* Exception 7.

8. Whether the ALJ's finding that the statement, "I spoke with some CNAs on the floor and they're really upset that you took those CNAs that Mary Ellen hired and put them in other positions rather than putting them on the floor to do work as a CNA on the floor" means that Hentz expressed concerns held by "other employees" is based on an erroneous credibility determination and unsupported by the preponderance of the evidence. (ALJD p. 11, lines 17-23; p. 32, lines 28-29.) *See* Exception 8.
9. Whether the ALJ's finding that Hentz engaged in protected activity when he walked along with Morrison and told the administrator about the CNAs' complaints that the floors were understaffed is erroneous because such finding is contrary to NLRB case law and other authority. (ALJD p. 11, lines 24-26.) *See* Exception 9.
10. Whether the ALJ's failure to make any findings as to whether alleged concerns expressed to Morrison when Hentz walked down the hall with him were based on "honest and reasonable belief(s)" held by those CNAs in accordance with NLRB v. City Disposal Systems, 465 U.S. 822, 840 (1984), and other applicable authority. (ALJD p. 11, lines 24-26 and passim.) *See* Exception 10.
11. Whether the ALJ's finding that Hentz was not simply speaking to benefit himself is unsupported by the preponderance of the evidence. (ALJD p. 11, lines 32-33.) *See* Exception 11.
12. Whether the ALJ's finding that Hentz telephoned corporate-level management to express "employees' concerns" about racial prejudice in the workplace is unsupported by a preponderance of the evidence. (ALJD p. 11, lines 35-37.) *See* Exception 12.
13. Whether the ALJ's finding that Hentz made a call to corporate-level management "shortly after" having conversations with other employees on or around November 9, 2016, is

unsupported by the preponderance of the evidence. (ALJD p. 11, line 37 through p. 12, line 1; p. 13, lines 10-11; p. 16, lines 12-14; p. 25, lines 18-19; p. 33 fn. 21 (lines 5-6).) *See* Exception 13.

14. Whether the ALJ's finding that other employees shared Hentz's belief that racial prejudice resulted in some employees being treated differently from others is unsupported by the preponderance of the evidence. (ALJD p. 12, lines 5-6; p. 16, lines 19-22; p. 33, fn. 22 (lines 1-2).) *See* Exception 14.
15. Whether the ALJ failed to make necessary findings as to whether the concerns Hentz expressed in connection with his call to PruittHealth's Corporate Office and the Veterans' Home's investigation into those concerns were "based on [those other employees'] honest and reasonable belief(s)" of the alleged race discrimination reported. (ALJD p. 11, lines 25-27.) *See* Exception 15.
16. Whether the ALJ's finding that Marie Williams, Linda Brinson, Danielle Jeter, or anyone else (referred to generally as "employees" during the period Hentz worked for the Veterans' Home) believes that there is a difference in the way employees are treated is vague and unsupported by the preponderance of the evidence. (ALJD p. 12, lines 5-13; fn. 7 (lines 1-7); p. 25, lines 15-20.) *See* Exception 16.
17. Whether the ALJ failed to make necessary findings as to whether alleged concerns attributed to Marie Williams, Linda Brinson or Danielle Jeter were "based on [those individuals'] honest and reasonable belief[s]." (ALJD p. 12, lines 9-13; fn. 7 (lines 1-7); passim.) *See* Exception 17.
18. Whether the ALJ's finding that he did not consider the "truth of the matter asserted" by concluding that Williams believes there is a difference in the way employees are treated is

erroneous because the ALJ incorrectly applied NLRB case law and other authority. (ALJD p. 11, fn. 7 (lines 1-7); p.15, lines 7-14.) *See* Exception 18.

19. Whether the ALJ's finding that when Hentz telephoned the corporate headquarters and spoke with Manager Ellis, he was engaged in protected concerted activity is erroneous because that conclusion is unsupported by a preponderance of the record evidence and the ALJ fails to address critical, credible and contradictory evidence the ALJ is obligated to consider and reconcile and the ALJ's conclusion is based on legal error. (ALJD p. 13, lines 11-12.) *See* Exception 19.
20. Whether the ALJ's finding that Hentz assisted others by voicing "their complaints" to corporate-level management is erroneous because the ALJ fails to address critical, credible and contradictory evidence the ALJ is obligated to consider and reconcile. (ALJD p. 14, lines 36-37; p. 32, lines 27-29 and 36-45; p. 33, lines 6-9.) *See* Exception 20.
21. Whether the ALJ's finding that Hentz had spoken with other workers who agreed with him that African-American employees were being treated differently is erroneous because such finding is not supported by the preponderance of the evidence. (ALJD p. 14, lines 14-16.) *See* Exception 21.
22. Whether the ALJ's analysis of Hentz's statement to Della Mervin, "I'm not here to talk about them. I'm here to talk about me," and the ALJ's implied finding that Mervin is unreliable because she was paraphrasing or could have taken Hentz's words out of context, is an erroneous credibility determination and an analysis unsupported by the preponderance of the evidence. (ALJD p. 14, lines 19-32; p. 33, fn. 21 (lines 1-9).) *See* Exception 22.
23. Whether the ALJ's finding that witnesses identified by Hentz had seen other things which also demonstrated the presence of racial prejudice in the workplace and that others perceived an

atmosphere of racial bias is unsupported by the preponderance of the evidence. (ALJD p. 15, lines 4-8.) *See* Exception 23.

24. Whether the ALJ's finding that a "feeling" of being heard is a condition of employment is erroneous because such finding is an unreasonable application of the NLRA and not in accordance with sound labor board policy. (ALJD p. 15, lines 14-26.) *See* Exception 24.

25. Whether the ALJ's generalized finding that "employees were sincere" and "had some basis for believing that management was not listening to them" is erroneous because such finding is vague and not supported by the preponderance of the evidence and the ALJ failed to address critical, credible and contradictory evidence showing that Morrison did listen to employees as part of his "open door" policy. (ALJD p. 15, fn. 10 (lines 2-5).) *See* Exception 25.

26. Whether, for purpose of presentation of this issue to the National Labor Relations Board and consideration in any applicable appeals, the ALJ erred in failing to overrule Fresh & Easy Neighborhood Market, Inc., 361 NLRB No. 12 [200 LRRM (BNA) 1401], 2014 WL 3919910, No. 28-CA-064411 (8/11/14), to the extent that decision is inconsistent with the standard for protected concerted activity under Section 7 of the NLRA articulated in former Member Miscimarra's dissent in that opinion. (ALJD p. 15, lines 28 through p. 16, line 22; passim.) *See* Exception 26.

27. Whether the ALJ's application of Compuware Corp., 320 NLRB 101 (1995), enf. 134 F.3d 1285 (6th Cir. 1998), is contrary to established NLRB case law and other authority and sound labor policy and based on facts not supported by the preponderance of the evidence. (ALJD page 16, lines 1 through 22.) *See* Exception 27.

28. Whether the ALJ's finding that Missy Ellege ever denied a request by Brandi Sigmund to work "PRN" is unsupported by the preponderance of the record evidence. (ALJD p. 21, lines 20-39; p. 22, lines 22-24 and 31-34; p. 23, lines 25-27; p. 24, lines 2-6.) *See* Exception 28.
29. Whether the ALJ's finding that Brandi Sigmund wanted to work "PRN" is unsupported by the preponderance of the record evidence. (ALJD p. 23, fn. 14 (lines 1-7).) *See* Exception 29.
30. Whether the ALJ's finding that Missy Ellege was a "Director of Health Services" is erroneous because such conclusion is not supported by the preponderance of the record evidence. (ALJD p. 24, lines 3-6.) *See* Exception 30.
31. Whether the ALJ's finding that Hentz told Morrison, "I feel like Amy definitely treats African Americans differently than she do [sic] others, and I'm not the only one. I've had that conversation with other people as well who felt like there definitely was a discrepancy in the way that she treated African Americans. I mean she was very standoffish and whatnot. And I told him I was going to go to corporate," is erroneous because such finding is not supported by a preponderance of the record evidence and because the ALJ made erroneous credibility determinations and failed to evaluate critical, credible and contradictory evidence showing that this statement was never made. (ALDJ p. 25, lines 24-30.) *See* Exception 31.
32. Whether the ALJ's finding that Hentz's statements to Tammy Ellis show that "[Hentz] was expressing the work-related concerns of other employees as well as his own" is unsupported by the preponderance of the evidence. (ALJD p. 28, lines 4-5; p. 32, lines 27-29.) *See* Exception 32.
33. Whether the ALJ made an erroneous credibility determination in concluding that Hentz told Ellis "that myself as well as some other staff members there felt like Amy and some other staff members were definitely racist" because the preponderance of the evidence does not support

the conclusion that that statement was ever made or the ALJ's conclusion that Ellis took any notes of her communications with Hentz. (ALJD p. 12, lines 16-35; p. 13, lines 4-7; p. 26, fn. 16 (lines 1-5); p. 27, line 17 through p. 28, line 16.) *See* Exception 33.

34. Whether the ALJ's legal analysis and conclusions of law with respect to protected concerted activity, including whether such statements must be made in good faith, is unsupported because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support any of these conclusions and because such analysis and conclusions are based on legal error. (ALJD p. 25, lines 14-20; p. 28, lines 16-25; p. 32, lines 1-45; p. 33, lines 1-21; p. 34, lines 1-4; p. 46, lines 5-15; p. 50, lines 30-34; p. 52, lines 11-19.) *See* Exception 34.
35. Whether the ALJ's legal analysis and conclusions of law with respect to the Veterans' Home's knowledge of Hentz's alleged protected activity are erroneous because the ALJ failed to make necessary findings as to which instances of protected activity Morrison knew of and, instead, based his opinion on an improper imputation of knowledge to Morrison. (ALJD p. 16, lines 26-8; p. 32, lines 2-8; p. 33, lines 10-22.) *See* Exception 35.
36. Whether the ALJ's legal analysis and conclusions of law with respect to the Veterans' Home's knowledge of Hentz's alleged protected activity are erroneous because the preponderance of the evidence does not support a finding that Hentz told Morrison he would be contacting PruittHealth's Corporate Office to report alleged discrimination or that Morrison knew what Hentz communicated to PruittHealth's Corporate Office or otherwise during the corresponding investigation. (ALJD p. 33, lines 10-21; p. 50, lines 30-34.) *See* Exception 36.
37. Whether the ALJ's proposed remedies should be denied because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support

any such remedies with respect to the discipline, alleged demotion, and termination of Hentz, and because the ALJ's proposed Order is based on legal error. (ALJD p. 51, lines 15-32.) *See* Exception 37.

38. Whether the contents of the ALJ's proposed Order with respect to Hentz should be revised because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's decision, does not support the issuance of any such Order. (ALJD p. 53, lines 6-42; p. 52, lines 36-42; p. 54, lines 2-4 and Appendix A.) *See* Exception 38.

III. STANDARD OF REVIEW

The Board may overrule an ALJ's credibility resolution when the clear preponderance of all the relevant evidence convinces the Board that those resolutions are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951). When "the judge's resolution [ ] was not based on the demeanor of witnesses, but on facts established by other evidence and inferences drawn from those facts. . . . the Board is as capable as the judge of analyzing the record and resolving credibility issues." Samsung Elecs. Am., Inc., 363 NLRB No. 105 (slip op.), 2016 WL453584, at *3 (Feb. 3, 2016) (citing Herman Bros., Inc., 264 NLRB 439, 441 n.12 (1982)).

An ALJ's factual findings as a whole must show that he "implicitly resolve[d]" conflicts created by all the evidence in the record. NLRB v. Berger Transfer & Storage Co., 678 F.2d 679, 687 (7th Cir. 1982); see also NLRB v. Katz's Delicatessen of Houston St., Inc., 80 F.3d 755, 765 (2nd Cir. 1996) (An ALJ may resolve credibility disputes implicitly rather than explicitly where his "treatment of the evidence is supported by the record as a whole."). The critical element in this standard is the concept of "on the record as a whole." As the Supreme Court instructs, the Board may not make its determination:

> … merely on the basis of evidence which in and of itself justifie[s] it, without taking into account contradictory evidence and evidence from which conflicting inferences could be drawn. See Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951).

Rather, the Board must "take into account whatever in the record fairly detracts from [the] weight" of the ALJ's decision. TNS, Inc. v. NLRB, 296 F.3d 384, 395 (6th Cir. 2002) (quoting Universal Camera Corp., 340 U.S. 474, 487 (1951). Stated another way, it is "not good enough" that the record contain some evidence that could have conceivably supported an ALJ's finding. The Universal Camera standard is not satisfied if the ALJ does not discuss, or even provide a citation, to that evidence. Sears, Roebuck & Co. v. NLRB, 349 F.3d 493, 514 (7th Cir. 2003) (citing Scivally v. Sullivan, 966 F.2d 1070, 1076 (7th Cir. 1992) (holding that "the ALJ must minimally articulate his reasons for crediting or rejecting" evidence)); Ppg Aerospace Indus., Inc., 353 NLRB 223, 224 (2008) (failure to explain credibility discrepancies resulted in remand of case in part).

The "clear preponderance of all the relevant evidence" standard only governs Board review of an ALJ's credibility determinations based on witness demeanor. Standard Dry Wall Products, Inc., 91 NLRB 544, 545 (1950). The Board is to "base [its] findings as to the facts upon a *de novo* review of the entire record." Id. That same standard applies to the ALJ's legal conclusions and derivative inferences. Id.

IV. ARGUMENT

A. THE ALJ ERRED IN CONCLUDING THAT THE VETERANS' HOME VIOLATED SECTION 8(A)(1) OF THE ACT BY ISSUING A FINAL WRITTEN WARNING, ALLEGEDLY DEMOTING, AND DISCHARGING HENTZ BECAUSE THE ALJ ERRONEOUSLY CONCLUDED THAT HENTZ HAD ENGAGED IN PROTECTED CONCERTED ACTIVITY UNDER SECTION 7 OF THE ACT.

1. The ALJ's Findings With Respect to Hentz's Communications with Morrison About the Workplace Are Not Supported by a Preponderance of the Evidence, and the ALJ Made An Erroneous Credibility Determination and Failed to Evaluate Critical, Credible and Contradictory Evidence That This Statement was Never Made.

   (Exceptions 1, 7, 31, 36)

The ALJ erred in finding that Hentz told Morrison, "I feel like Amy definitely treats African Americans differently than she do [sic] others, and I'm not the only one. I've had that conversation with other people as well who felt like there definitely was a discrepancy in the way that she treated African Americans. I mean she was very standoffish and whatnot. And I told him I was going to corporate." ALJD 25:24-30. The ALJ failed to address the fact that this statement conflicted with at least four pieces of evidence: (1) Morrison's credible denial that Hentz ever complained to him about race-related issues and his testimony that he did not know Hentz complained to corporate about a race-related concern until after Hentz's termination (Tr. 44:17-19, 84:10-23, 481:6-20, 556:2-25, 557:1-15, and 621:4-10); (2) Horton's alleged communications with Morrison in which Horton (a witness the ALJ claims he found credible) testified that Morrison asked her if she knew what was going on when someone from PruittHealth's Corporate Office came to the facility (Tr. 280:3-281:12) (a question that would make no sense if Hentz had told Morrison prior to placing the call exactly what he was planning to do), (3) Hentz's testimony that he talked with Brinson and Jeter about alleged discrimination by the Activities Director Amy Ferguson *after* (not before) he called PruittHealth's Corporate Office (Tr. 138:24-139:13), and

(4) Hentz's own testimony that, when he was questioned by Morrison about why someone from PruittHealth's Corporate Office was coming to the facility, Hentz referred to only "some staff" (and not himself) having concerns and added, "Well, I don't really know." Tr. 147:19-149:6. Clearly, that response would have made no sense if Hentz had, in fact, made the statement referenced above to Morrison, as he so claimed at the hearing. Indeed, if Hentz's alleged statement to Morrison had been made, Hentz's more natural response to the alleged question posed by Morrison to him would have been, "Don't you remember our prior conversation? Someone must be here to follow-up on that complaint that I just told you I was going to make to the Corporate Office" or something along those lines. The alleged conversation reflected above was undocumented and uncorroborated and is inconsistent with Hentz's own testimony. The ALJ erred in failing to recognize this inconsistency and made an erroneous credibility determination in concluding that statement was made. Accordingly, his finding is unsupported by the preponderance of the evidence and should be reversed.

2. The ALJ Erred In Finding that Rick Luce Was Concerned About Staffing Because That Statement is Not Supported by a Preponderance of the Evidence and the ALJ Made an Erroneous Credibility Determination and Failed to Make a Required Finding as to Whether Luce's Concern was Based on an Honest and Reasonable Belief.

   (Exceptions 4, 5, 8)

The ALJ erred in finding that Rick Luce was concerned about staffing. ALJD 10:13-14, 10:30-35 and 34:1-2. The ALJ appears to have based such conclusion on an alleged preference Luce expressed for seeing a handful of newly hired CNAs assigned to work on the floor and not with residents on activities. Id. The witness best capable of confirming whether Luce had concerns about such matter was Luce himself. Despite having the power to subpoena Luce to take the stand, neither the Counsel for the General Counsel nor Mr. Hentz's counsel called Luce to provide any

sworn testimony at the hearing. See Board Rule § 101.10(a) ("The attendance and testimony of witnesses and the production of evidence material to any matter under investigation may be compelled by subpoena."). Thus, no credible evidence was elicited to establish whether Luce honestly and sincerely (or even reasonably) held any of such belief purported to be attributed to him.[2] None of the parties produce any documented evidence of Luce holding such a view. The ALJ failed to explain why Hentz's uncorroborated and undocumented hearsay was worthy of credence. In reality, Hentz's claims that he was speaking on behalf of Luce are unsupported by a preponderance of the evidence. The ALJ further failed to make any finding, as he was obligated to do, as to whether the alleged concerns attributed to Luce were "based on an honest and reasonable belief" held by Luce. See NLRB v. City Disposal Systems, 465 U.S. 822, 840 (1984); see also Board Rule 101.11(a) (requiring ALJ to make findings of fact and conclusions on "all material issues").

Hentz's testimony alone on this issue reveals that Hentz's testimony is unreliable and internally inconsistent. Indeed, Hentz appears to have taken "personal liberties" in characterizing his communications with Morrison. Tr. 120:3-12. Hentz testified as follows:

Q. Did you respond to Mr. Luce's concerns?

A. I did. I took his concerns to Justin.

Q. Do you recall when you took those concerns to Mr. Morrison?

A. It was the same day. It was shortly thereafter. I was working on the schedule.

[2] The Veterans' Home does not object to Hentz's statement about what he heard Luce say comprising part of the record in this matter, as the Veterans' Home understands that such statement falls within the scope of the General Counsel's claim that Hentz made various statements during his employment about staffing that allegedly caused certain employment actions to be taken. Hentz was never asked, nor would he have been competent to testify to, whether Luce's statements were truthful or even sincere. The ALJ's findings with respect to Jennifer Horton's testimony (ALJD p. 16, fn. 11, "she readily admitted that her reply to Morrison's question [of "Do you think I'm racist?" during her employment] had not been truthful") confirms the principle that just because a statement is made within the context of one's employment does not make it true.

Q. Do you recall what time of day it was?

A. It was in the afternoon.

Q. Do you recall where the conversation took place?

A. In Justin's office.

Q. Who was present for the conversation?

A. Just the two of us.

Q. How did the conversation begin?

A. Well, I came in. I told him that I was working on the schedule. I was trying to get people. I showed him the schedule, as I did on a daily basis. And he said okay. And then at that point, I addressed, I said I've spoken to **some of the CNAs**. I didn't tell him **it was Rice Luce**. I guess he knows now. But I said I spoke with **some of the CNAs** on the floor and they're really upset that you took those CNAs that Mary Ellen hired and put them in other positions rather than putting them on the floor to work as a CNA on the floor.

Tr. 119:16-120:12 (bold added). Nowhere in the ALJ's opinion does the ALJ address the tension between what Hentz claims he told Morrison—namely, that he had talked with multiple unnamed "CNAs" (plural). But that, according to Hentz, the only person he had really talked with (allegedly) was Rick Luce. This unaddressed inconsistency, especially when coupled with the uncorroborated nature of Hentz's alleged communications, amounts to clear error.

3. <u>The ALJ Erred in Concluding that Brandi Sigmund Wanted to Work But Was Denied "PRN" Status by the Director of Health Services.</u>

(Exceptions 28, 29, and 30)

The ALJ erred in finding that Brandi Sigmund "believed that working as an on-call (or PRN) nurse would solve [a] scheduling conflict." ALJD 21:16-18. The ALJ appears to have based such conclusion of an alleged preference on a statement Hentz attributed to her.[3] ALJD 21:23-34.

[3] Respondent does not object to Hentz's statement about what he heard Sigmund say comprising part of the record in this matter for the reason expressed in fn. 2. Hentz was never asked, nor

As with the case of Rick Luce, the witness best capable of confirming whether Sigmund truly wanted to work "PRN" was Sigmund herself. Despite having the power to subpoena Sigmund to take the stand, neither the Counsel for the General Counsel nor Mr. Hentz's counsel called Sigmund to provide any sworn testimony at the hearing. See Board Rule § 101.10(a). Thus, no credible evidence was elicited to establish whether Sigmund honestly and sincerely (or even reasonably) held any such desire purported to be attributed to her. None of the parties produce any documented evidence of Sigmund holding such a view. The ALJ failed to explain why Hentz's uncorroborated and undocumented hearsay establishes Sigmund's alleged belief. In reality, Hentz's claims that he was speaking on behalf of Sigmund are unsupported by a preponderance of the evidence.

The ALJ further appears to have completely disregarded the nature of the alleged communication between Hentz, Sigmund, and the Company's Human Resources Department.[4] Hentz's own testimony shows how his involvement served to create, or at least exacerbate, unnecessary confusion over an otherwise simple staffing request. Hentz testified as follows:

> Q. What was said during that conversation?
>
> A. I just told him Brandi wants to change her status to PRN, she can't do the days on the schedule, the on-call days conflicts with her school, just voiced her concern to him.
>
> Q. Did Mr. Morrison respond at all?
>
> A. He did. He told me to go see Missy Ellege.

---

would he have been competent to testify to, whether Sigmund's statements were truthful or even sincere—an entirely separate issue from whether the statement was made.

[4] Along these same lines and with respect to Exception 29, the ALJ erred in concluding that Missy Ellege was the "Director of Health Services" because a preponderance of the evidence does not support such conclusion. As the parties stipulated, Missy Ellege was a Human Resources / Payroll Coordinator who worked in the Company's Human Resources Department. Joint Exh. 1 (Joint Stipulation No. 8). As the parties further stipulated, the Director of Health Services position was held by Mary Ellen Shepherd (from September 1, 2016, until October 31, 2016) and then Crysta Dickens a/k/a Crysta Bloomberg (from October 24, 2016, until December 13, 2016). Id. (Joint Stipulations Nos. 6-7).

Q. Did you do that?

A. I did.

Q. When did you go to Ms. Ellege?

A. Right after leaving his office. I went to Missy's office.

Q. Other than the two of you was anyone else present.

A. No, just me and Missy.

Q. What was said at that point?

A. She said that I **could not schedule a PRN employee**. She said it didn't work **that way.** Brandi wanted to set up I guess sort of like a rotating schedule on weekdays, I don't know, for example, like every week Monday and Wednesday. And Missy said you can't do that because you're scheduling her **and so in fact she would not be a PRN employee, but a part-time employee**.

Tr. 123:14-124:10. In what next appears to be like a scene from a television sitcom, Hentz then claims he told Sigmund (who supposedly wanted to work "PRN") that she could not do so, and that Sigmund allegedly believed that was unfair because another employee *was able to pick which days he would work* (which is an entirely different issue than working "PRN"—in other words, as the need arises within the Veterans' Home). Tr. 124:16-125:11. Hentz apparently neglected to point out to Sigmund that Ellege was, by Hentz's own recitation of events, making a distinction between what it means to be a "PRN employee"[5] as opposed to a "part-time employee" – specifically, that one is given a set schedule, while the other is not. Tr. 123:14-124:10. This distinction, apparently lost on Hentz, appears to have generated unfortunate confusion for Sigmund. Tr. 124:16-125:11. Thus, the preponderance of the evidence shows that Hentz was not

[5] PRN is a commonly used term in the long-term care industry. It is an abbreviation of "when necessary" from the Latin *pro re nata* – meaning "as circumstances require." Having any type of set schedule (whether full-time or part-time) is obviously different than only being called into work when the needs of the facility so dictate.

acting as an advocate so much as a source of confusion and misinformation. Accordingly, the ALJ erred in concluding that Ellege ever denied a request by Sigmund to work "PRN" (if that's even what she was requesting, as opposed to a part-time, fixed schedule arrangement) because the preponderance of the evidence shows only that Ellege had expressed a distinction between a "PRN employee" and a "part-time employee."

4. The ALJ Erred In Concluding that Hentz's Statements to Morrison Consisted of Protected Concerted Activity Within the Meaning of Section 7 Because Such Finding is Inconsistent with Board Precedent, Other Applicable Authority and Sound Labor Board Policy and the ALJ Failed to Reconcile Critical Contrary Evidence and Make Required Findings.

   (Exceptions 6, 9, 10, 11, 27, 34-38)

Further, the ALJ erred in concluding that Hentz had engaged in protected activity when he walked along with Morrison and told Morrison about the CNAs complaints that the floors were understaffed. ALJD 11:24-26. The ALJ's opinion erroneously does not identify whose belief Hentz supposedly reported to Morrison when he was walking in the hall. See Ppg Aerospace Indus., Inc., 353 NLRB 223, 224 (2008) (failure to explain credibility discrepancies resulted in remand of case in part).

The ALJ's opinion is also erroneous because it fails to make the necessary finding as to whether the employee, on whose behalf Hentz was reportedly speaking in his conversations with Morrison, had an honest belief that the facility was understaffed. See City Disposal Systems, 465 U.S. at 840; Board Rule 101.11(a). Moreover, there is no evidence that any of those unnamed employees knew that Hentz had planned to report such matters to Morrison or that they requested he do so or expressed their approval of him having done so. See Tr. 111:11-127:7. Further, the preponderance of the evidence provides no basis for any conclusion that those employees were planning to take action on any of those complaints. Accordingly, Hentz was not articulating a

protected group complaint. Any conclusion that these discussions amounted to concerted protected activity is legal error. See Meyers Indus. (II), 281 NLRB 882, 885 (1986) (holding that, to find an employee has engaged in concerted activity for employees' mutual aid and protection, the Board requires the activity "be engaged in with or on the authority of other employees, and not solely by and on behalf of himself"); Walmart, NLRB Div. of Advice, No. 17-CA-25030 (Sept. 25, 2011) (ALJ held that employer lawfully discharged employee because employee's individual gripe did not rise to concerted activity under the Act); NLRB v. Datapoint Corporation, 642 F.2d 123, 128 (5th Cir. 1981) (finding statements of employee on factory floor who loudly protested employer's decision to lay off all but three employees while company department relocated did not constitute concerted activity, and instead, had expressed only personal gripes not related to any sort of group action); accord Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967) (no concerted protected activity, despite evidence that at least two other employees suggested captions to the charging party and one of them posted a cartoon ridiculing employer's proposed wage package, where record lacked evidence that the charging party prepared and posted cartoons for purpose of inducing or preparing for any group action by the employees, and there was no agreement among the employees "to present their views as a group" on such wage package).

The ALJ's opinion states that, "The Board has consistently defined concerted activity as encompassing the lone employee who is acting for or on behalf of other workers, or one who has discussed the matter with fellow workers, or one who is acting alone to initiate group action, such as bringing group complaints to management's attention." ALJD 28:15-23 (citing Kvaerner Philadelphia Shipyard, 347 NLRB 390 (2006), citing NLRB v. City Disposal Systems, 465 U.S. 822 (1984)). However, what Kvaerner Philadelphia Shipyard actually says is:

> Under Board law, to find that the Respondent discharged Smith for engaging in protected concerted activity, the General Counsel must show that Smith was engaged in protected

> concerted activity, i.e., that Smith was acting for, or on behalf of, other workers or was acting alone to initiate group action, such as bringing group complaints to management attention.

347 NLRB at 392. The ALJ appears to have inserted the phrase "or one who has discussed the matter with fellow workers" on his own volition. Nowhere does Kvaerner Philadelphia Shipyard cite City Disposal Systems for that proposition.[6]

The ALJ's opinion states that Board precedent does not require that, to be engaged in protected activity, employees had to be planning to take some specific concerted action, such as picketing, which involved more than one participant. ALJD 16:2-5. The ALJ cited Compuware Corp. v. NLRB, 320 NLRB 101 (1995), enf. 134 F.3d 1285, 1289 (6th Cir. 1998), to support that statement, and erroneously concluded that Compuware supported the conclusion that Hentz had engaged in protected concerted activity within the meaning of Section 7.

Compuware is readily distinguishable from the facts of this case. In Compuware, two coworkers testified that they had not authorized the charging party to represent their concerns to management, but the 6th Circuit nonetheless found evidence of concerted activity. Compuware Corporation, 134 F.3d at 1289-90. In its decision, the Court noted that from the beginning of the charging party's employment, he had discussed work-related concerns with many of the thirty other trainers. Id. at 1290. Notably, at the hearing, one of those coworkers testified that the charging party said, "he was going to speak for all of us that afternoon [at the meeting]. . . ." Id. The Court also noted that the charging party showed that he was acting on behalf of the group by

[6] The ALJ's conclusion that "Section 7 does not include any requirement that an employee have a good faith belief in the merits of his complaint" is also incorrect. Such beliefs must indeed be in good faith and reasonable to be protected within the Act. See City Disposal Systems, 465 U.S. 840. Even Kvaerner Philadelphia Shipyard recognizes that an employee's statements lose their protection if they are found to be made with knowledge of their falsity or with reckless disregard for whether they are true. 347 NLRB at 392 (citing Linn v. Plant Guard Workers Local 114, 383 U.S. 53, 61 (1966)).

facilitating a lunch discussion between managers and trainers. Id. Conversely, the employees demonstrated sharing the charging party's interest in obtaining resolution of their grievances by attending the lunch meeting at his request. Id. Moreover, the charging party made it known to management and his coworkers that he had organized a labor union at a previous job and received a degree in labor relations. Id. In fact, some of the other trainers had previously commented that because the charging party "knows this stuff, he should talk to the management people." Id.

In the present case, the ALJ made no finding that any employee directed Hentz to go talk with Morrison about his or her complaint. Nor was there any evidence that Hentz told other coworkers he would accept the responsibility for presenting their concerns to management (or that those coworkers demonstrated any subsequent interest in Hentz's actions by ensuring the matters were pursued to any specific desired outcome). Nor were there any specific steps taken together with the employees with whom Hentz reportedly spoke about staffing or other concerns demonstrating that they shared Hentz's interest in obtaining resolution to any particular grievance. Neither Luce nor Sigmund testified at the hearing about what actions, if any, they expected Hentz to take or what outcome they wanted to from any communications purporting to be expressed on their behalf (if they even shared the viewpoints Hentz purports to attribute to them, which the evidence fails to establish).

Not all group complaints are protected. For example, in Manimark Corp. v. NLRB, 7 F.3d 547, 551 (6th Cir. 1993), the Court determined that an employee's action was not "concerted" within the meaning of Section 7 of the NLRA, even though the employee had raised concerns to his employer that were shared by other employees. The court stated that it "has never held that an employee's action in merely repeating the jointly held concerns of other employees, standing alone, suffices for a finding of concerted action." Id. Indeed, an "inquiry into the concerted nature

of conduct should not focus solely upon the group nature of the complaints. Instead, it also should air *what the employees decided to do about those complaints*. Here, while there was evidence that drivers were irritated by working conditions, there is nothing to indicate that they had decided to act upon those annoyances." Id. (italics added).

The preponderance of the evidence in the instant case is similar to the facts in Manimark. Even if the Board were to conclude that a preponderance of the evidence shows Hentz relayed to Morrison or others a concern about which others in the facility had expressed honest intellectual assent (i.e., the desirability of additional staff) (a point the Veterans' Home does not concede), the ALJ did not cite any evidence in his opinion to show that any of those employees *were planning on taking any action on those complaints*. Indeed, despite providing 168 pages of testimony, Hentz himself provided no testimony as to what type of "group action" he was looking to accomplish with or through Luce (and/or unnamed "CNAs"), Sigmund, or others. See Tr. 91:1-259:25. In contrast, Hentz admitted that his communications with Morrison about employees' concerns were through the use of "very vague terms." Tr. 242:25-243:1. Hentz admitted as follows:

> Q. Of the individuals that you identified earlier as being people that you would talk with from time to time, some of those were Linda Brinson?
>
> A. Um-hum.
>
> Q. Yes? Tiffanie Robinson?
>
> A. Yes.
>
> Q. Tonya Fleming?
>
> A. Toya Fleming.
>
> Q. Toya Fleming.
>
> A. Yes, ma'am.
>
> Q. Marie Williams and others?

A. Yes.

Q. In any of your communications with Mr. Morrison, did you ever reference those individuals by name in connection with any concern or complaint?

A. No, I didn't. . . . [W]henever I would talk to him, I'd say I've spoken to some of the staff or some of the CNAs. I used very vague terms as to make sure not to identify anybody to him.

Q. So if you communicated anything at all to Mr. Morrison, it was an underlying concern but you did not use the name of anyone else when you spoke to him?

A. No, I did not disclose anybody's names to with anyone including Justin [Morrison]. Well, I'm sorry, except for those I testified to earlier, Danielle Jeter, Danisa Taylor, Linda Brinson.

Q. What specifically do you remember telling Mr. Morrison about Danielle Jeter?

A. Not Mr. Morrison. I said I did not disclose any. I misspoke. I said that I had not disclosed anyone's name to Justin or anyone in corporate and then I went on to say I mean to say I told Della Mervin about Linda Brinson, Danielle Jeter, and Danisa Taylor. I did not tell Justin about that.

Q. So in all of your communications with Mr. Morrison, you never used Danisa's name?

A. No, not that I recall.

Q. And in your communications with Mr. Morrison, you never used Danielle Jeter's name?

A. No, ma'am.

Q. And in your communications with Mr. Morrison, you did not use Linda Brinson's name.

A. Not that I recall, no.

Tr. 242:5-243:25. The ALJ failed to address and reconcile this critical and contrary evidence with his conclusion.

Here, there was simply no forward-looking action at all by anyone. Instead, Hentz had engaged in mere griping about matters at issue – specifically, whether the CNAs hired by Shepherd

should be assigned to help with the residents' activities or instead "on the floor." The issue with respect to Sigmund's alleged request to work "PRN" was clearly whether such request should be handled in or through Hentz and/or Morrison or, instead, taken up directly with HR, and given the confusion that Hentz had interjected into the matter (unfortunately for Sigmund), directing those discussions to HR directly was entirely appropriate. Accordingly, the ALJ erred in concluding that Hentz engaged in concerted protected activities with respect to any such discussions. See Meyers Industries (II), 281 NLRB 881, 885 (1986); Walmart, NLRB Div. of Advice, No. 17-CA-25030 (Sept. 25, 2011); NLRB v. Datapoint Corp., 642 F.2d 123, 128 (5th Cir. 1981); Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967).[7]

5. The ALJ Erroneously Concluded that Hentz Called PruittHealth's Corporate Office *Before* Speaking with Brinson and Jeter and Such Finding is Not Supported by the Preponderance of the Evidence.

(Exception 13)

The ALJ's conclusion that Hentz called PruittHealth's Corporate Office before speaking with Brinson and Jeter is unsupported by the preponderance of the record evidence. ALJD 11:37 through 12:1 and 16:12-14 and 33, fn. 21 (lines 5-6).[8] Hentz testified that in the conversation in which he, Linda Brinson, and Danielle Jeter discussed write-ups issued by the Veterans' Home's former Activities Director Amy Ferguson that he told Jeter and Brinson that he "had called corporate" (past tense). Tr. 138:24-139:10. Neither Brinson nor Jeter provided any testimony on this issue. Accordingly, statements allegedly made by Jeter and/or Brinson pertaining to alleged

[7] The ALJ also failed to make a necessary finding as to whether any alleged concern expressed to Morrison when Hentz walked down the hall with him were based on an "honest and reasonable" belief held by the CNAs on whose behalf Hentz claims he was speaking. See City Disposal Systems, 465 U.S. at 840.

[8] Hentz claims he talked with CNA Marie Williams about alleged race discrimination; however, Hentz did not recall when those conversations occurred, saying only it could have been in October or November. Tr. 111:17-112:8.

discrimination by Ferguson could not possibly have prompted Hentz to call PruittHealth's Corporate Office because those statement, according to Hentz's own testimony, had not even been made prior to Hentz making that call. See id. Any finding to the contrary is clearly erroneous and unsupported by the preponderance of the evidence.

6. The ALJ's Conclusion that Hentz's Complaint About Employees' Subjective "Feeling" of Being Heard Was a Complaint About a Condition of Employment Is an Unreasonable Application of the Act and Contrary to Sound Labor Board Policy and Unsupported by the Preponderance of the Evidence and the ALJ Failed to Make Critical Findings.

   (Exceptions and 24 and 25)

The ALJ erred in concluding that Hentz's alleged statement to PruittHealth's Corporate Office that employees did not "feel" they were being heard pertained to a "condition of employment." ALJD 15:21-26. The ALJ cited no legal authority for the proposition that subjective feelings attributed to employees constitute a "condition" of employment. Any such finding is an unreasonable application of the Act and contrary to sound labor board policy and should be reversed. Allowing an employee to complain that he or she and another coworker do not feel "heard" would unnecessarily expand the scope of activities protected by Section 7 to unmanageable and unprecedented levels. Conceivably, if the ALJ's findings were adopted, any employee on the verge of termination for a legitimate reason could simply invoke a "key phrase" to the effect of, "So-and-so and I do not feel like you are really hearing us" to their manager and, thus, effectively insulate themselves from adverse action (assuming the employer would not want to bear the potential risk and cost of an unfair labor practice charge). This scenario would yield untenable, absurd results and should be rejected as an unreasonable application of the Act and inconsistent with sound labor board policy.

The ALJ also erred in finding that "employees were sincere" and "had some basis for believing that management was not listening to them" because such finding is not supported by the preponderance of the evidence. ALJD p. 15, n.10:2-5. It is unclear whose belief Hentz was purporting to express in that statement; the ALJ's opinion erroneously does not say. See Ppg Aerospace Indus., Inc., 353 NLRB at 224 (failure to explain credibility discrepancies resulted in remand of case in part). None of the employees at the hearing, other than Hentz, testified that they felt that management did not listen to them. Numerous employees Hentz claimed he spoke with about various work-related matters were never called to testify about their feelings or beliefs. Those individuals would not have been competent to testify as to whether management *actually was listening* to them. Morrison testified as follows:

> Q. If a partner has or an employee has a legitimate concern about staffing levels in the facility, what if anything would you expect that partner to do?
>
> A. I would expect them to use their chain of command or come and voice that concern to me.
>
> Q. Why would you expect that?
>
> A. Because I have an open door policy. People come in and out of my office every day. So if there's a legitimate reason or something that's going on, I'm all ears to listen to what they have to say.
>
> Q. Any other reason you would want to know if there were concerns about staffing levels in the facility?
>
> A. I want to know about staffing on a daily basis when I first got in the door. That's one of the first things I'm looking at is what our staffing levels are because I want staffing to be filled to an appropriate level to make sure we're within regulations.

Tr. 463:22-464:13. The ALJ failed to address this critical, credible, and contradictory evidence the ALJ is obligated to consider and reconcile and, as such, his opinion should be reversed.

7. The ALJ Erred in Concluding that Employees Shared Hentz's Concerns Regarding Alleged Race Discrimination by the Veterans' Home's Former Activities Director Amy Ferguson or Others and the ALJ Failed to Make a Required Finding as to Whether Any Such Concern was Based on an Honest and Reasonable Belief When Such Statements Were Made.

(Exceptions 14, 15, 16, 17, 18, 20, 21, 23)

The ALJ erred in finding that Jeter, Brinson, and/or Williams shared Hentz's concerns regarding alleged race discrimination by the Veterans' Home's Former Activities Director Amy Ferguson or others. ALJD 11:35-37, 12:5-6, 16:19-22. The ALJ appears to have based such conclusion on statements made by Hentz about what these individuals purported to believe. See id. However, the witnesses best capable of confirming whether Jeter, Brinson, and Williams honestly believed that Ferguson or others treated others unfairly based on race were Jeter, Brinson and Williams. Again, despite having the power to subpoena these individuals to take the stand, neither the Counsel for the General Counsel nor Mr. Hentz's counsel called them to provide any sworn testimony at the hearing. See Board Rule § 101.10(a). Thus, no credible evidence was elicited to establish whether Jeter, Brinson, and Williams honestly held any of any of beliefs attributed to them. None of the parties produce any documented evidence of those individuals holding such a view (such as a petition or other document reflecting their supposed viewpoints). Hentz's claims that he was speaking on behalf of Jeter, Brinson, and/or Williams are unsupported by a preponderance of the evidence and should be reversed.

Further, the evidence at the hearing included an intake report, which shows the substance of Hentz's concern when Hentz called PruittHealth's Corporate Office on November 9, 2016. GC Hr'g Exh. 6.[9] That document states in part:

> Details: Summary
>
> Summary: The caller stated that the activities director wrongfully reprimanded him because it was based on racial discrimination.

Id. That document notes that the caller (Mr. Hentz) went on to state "*this is a wrongful reprimand because* Ms. Ferguson has a history of nitpicking African-Americans" and then gives an example involving discipline issued to an employee named "Danielle" for wearing yoga pants. Id. (italics added). The document then states that both Danielle and Linda Brinson "can attest to the racial discrimination they are subject to" but does not further explain that comment, leaving no information as to how Brinson was allegedly impacted by any decision made by Ferguson. See id. As these statements make clear, the main concern Hentz was reporting was his own gripe about the reprimand issued to him; the remaining details were provided only as support for his primary contention that *he* had been treated unfairly. See id.

Any claim that Brinson, in particular, shared Hentz's viewpoint as to alleged race discrimination by Ferguson was undermined by the testimony of Human Resources Business Partner Della Mervin, who testified that, when she interviewed Brinson, Brinson provided comments critical of Ms. Ferguson, but denied having race-related concerns. Tr. 361:6-25. Mervin testified as follows:

> Q. And what do you recall Ms. Brinson saying?
>
> A. I talked with Ms. Brinson and she said that she felt like there was a lot of inconsistent things going on with the facility, mainly related to activities and Ms. Ferguson. She said that, you know, they were having a lot of issues and that Ms. Ferguson had made her cry. She talked about being disciplined for eating in the assembly room. She felt like she goes above and

[9] Hentz testified he spoke with Genice Campbell when he made this call. Tr. 136:15-25.

> beyond, but she felt like her supervisor lacked appropriate management skills and didn't really understand how to set goals and assessments.
>
> I specifically asked . . . if she felt like the issues that she was experiencing was based on race, and she said no. She felt that her supervisor needed some additional leadership training and had some poor management skills but it wasn't based on race. It was based on the fact that she wasn't a good leader.

Tr. 361:10-25. Mervin's communication with Brinson was memorialized in contemporaneous notes of her investigation, reflecting Brinson's denial of any belief that Ferguson made decisions based on race, stating:

> *Linda*
>
> . . .
> *Amy made her cry all the time*
> . . .
> *Weak leadership skills*
> ➔ *Acted same way no matter race*

See Respondent's Hr'g Exh. 9 at 5. The ALJ failed to address and reconcile this conflicting evidence his opinion, as he was obligated to do. Clearly, the preponderance of the evidence shows Hentz's concern about race discrimination had not expressed Brinson's views correctly *at all*, to the extent he was purporting to speak on her behalf (which he was not).

Any claim that Jeter, in particular, shared Hentz's viewpoint as to alleged race discrimination by Ferguson was undermined by Mervin's testimony. Mervin testified that she attempted to contact Jeter on multiple occasions, but Jeter did not respond to Mervin's attempts to reach her, from which one can reasonably infer that Jeter did not want to be involved. Tr. 364:9-17.

The ALJ also failed to make any finding that Brinson, Jeter, and/or Williams' so-called concerns were based on any "honest and reasonable belief" of discrimination. See City Disposal Systems, 465 U.S. at 840. The ALJ stated that he did not consider the "truth of the matter" asserted

by concluding that Williams believes there is a difference in the way employees are treated. ALJD 12, fn. 7 (lines 1-3). The Veterans' Home agrees with the ALJ that the issue of whether there was, in fact, race discrimination or understaffing at the Veterans' Home is not at issue in this proceeding, and has not been litigated in this case. But the issue of whether the concerns purporting to be held by other employees were honestly and reasonably held by those individuals is at issue, and the ALJ did not make the necessary findings on that issue. See City Disposal Systems, 465 U.S. at 840; see Board Rule 101.11(a).

The ALJ's statement that he did not consider the "truth of the matter asserted" with respect to Hentz's testimony about his conversation with Williams is not true. The ALJ appeared to have accepted Hentz's otherwise admissible statement that he spoke with Williams about whether individuals at the facility are treated differently (which was presumably offered into evidence only to show Hentz's own communications about staffing in the facility) for not only that purpose, but also the truth of the matter asserted by Hentz – i.e., that Williams believed they were not. The ALJ erred in relying on Hentz's testimony to establish Williams' belief. See Fed. R. Evid. 801(c).

8. The ALJ's Finding that Witnesses Identified by Hentz Had Seen Other Things Which Also Demonstrated the Presence of Racial Prejudice in the Workplace and That Others Perceived an Atmosphere of Racial Bias is Erroneous Because Those Findings Are Not Supported by the Preponderance of the Evidence.

   (Exception 23)

The ALJ's finding that witnesses identified by Hentz had seen other things demonstrating the presence of racial prejudice and that others perceived an atmosphere of racial bias is erroneous because it is not supported by a preponderance of the evidence. (ALJD 15:4-8.) It is not clear from his opinion who the ALJ is referring to, which constitutes error. See Ppg Aerospace Indus., Inc., 353 NLRB at 224 (failure to explain credibility discrepancies resulted in remand of case in part). The ALJ's findings may relate to Jennifer Horton. However, Hentz was never asked, and

never testified, that Jennifer Horton expressed any point-of-view to him during his or her employment with the Veterans' Home as to whether Morrison or Ferguson was prejudiced or bias in any way based on race. See Tr. 139:23-141:7. To the contrary, Hentz testified that Horton "was very careful not to say too much." Tr. 140:13-14. With respect to the coaching Hentz had received by Ferguson, Hentz claimed only that Horton had said something to the effect of, "that's [your] stuff" (presumably meaning she did not want to be involved), adding only something to the effect of, "if it was me, I would have just said, hey, can you go do that in the break room or something like that." Tr. 141:2-4.

Hentz testified that he had a discussion with Horton about alleged race discrimination *after* he had already called PruittHealth's Corporate Office. Tr. 140:10-17. In response, Hentz testified that Horton "mostly just listened. She let me vent to her and just kind of tell her what was going on." Tr. 140:15-16. Hentz further testified that, upon learning that Hentz had already contacted the PruittHealth Corporate Office, Horton said only, "Okay, well, just keep me posted, let me know what's going to, and let me know if you need anything." Tr. 140:19-20. Yet, there was no testimony elicited that Hentz requested any subsequent assistance from Horton, that Horton followed-up with Hentz (or vice versa) as to the status of the concern he raised with PruittHealth's Corporate Office, that Horton asked Hentz to make any complaints or her behalf, or that Hentz referenced Horton by name in any way, or any underlying concern she had, when Hentz complained to PruittHealth's Corporate Office about alleged discrimination by Ferguson.

Further, Horton's conflicting statements as to whether or not she believes Morrison is prejudiced and/or makes decisions based on race is not relevant to the analysis of whether Hentz engaged in protected concerted activity under Section 7, aside from the obvious conclusion that Horton's admitted willingness to lie detracts from her credibility (and the ALJ erred in concluding

otherwise). See Tr. 302:22-303:3 (Horton testifying under oath that she had lied to Morrison during her employment when he asked her if she thought he was racist); Manimark Corp., 7 F.3d at 551 (6th Cir. 1993) (an employee's action in merely repeating the jointly held concerns of other employees, standing alone, does not suffice for a finding of concerted action). Any suggestion to the contrary is legal error.

9. The ALJ Erred In His Evaluation of Hentz's Statement to Investigator Della Mervin "I'm Here To Talk About Me" Because the Preponderance of the Evidence Shows Hentz Raised a Personal Complaint to PruittHealth's Corporate Office.

(Exception 12, 19, 20, 22)

The ALJ found that Hentz had engaged in protected concerted activities because some employees assisted him and then he turned around and assisted them. ALJD 13:35-37. The preponderance of the record, however, reflects otherwise. Hentz testified that during a conversation in his office "Danielle [Jeter] mentioned and Linda [Brinson] kind of agreed, she said, you know I really truly think that Amy [Ferguson, Activities Director] is prejudiced. She doesn't talk to us. She has a problem with everything we do. She doesn't say much to us." Tr. 138:23-139:2. During that same conversation, in response, Hentz claimed, "Well, I told Danielle and Linda that I had called corporate." Tr. 139:7-10. Thus, Hentz had already contacted PruittHealth's Corporate Headquarters *before* this conversation with Brinson and Jeter. See id. Then, tellingly, once given the chance to discuss this matter further with Della Mervin, the assigned investigator, Hentz referenced Brinson and Jeter by name, but then told Mervin, "I'm not here to talk about them. I'm here to talk about me." Tr. 364:21-23; 370:1-5; 373:16-375:19; 379:14-21; 384:1-4. When Mervin interviewed Brinson, Brinson denied believing that Ferguson made decisions based on race and, instead, reported that Ferguson was not a good leader. Tr. 361:20-25. Mervin attempted to reach Jeter on multiple occasions; however, Jeter would not return Mervin's

phone call or efforts to reach her, which signified Jeter's disinterest in the matter. Tr. 364:9-17. Neither Brinson nor Jeter provided any testimony as to whether they had any race-related concerns about Ferguson or any other manager in the Veterans' Home.

As the ALJ pointed out in his decision, Hentz could have been called to the stand to rebut Mervin's repeated testimony about Hentz's statement, "I'm not here to talk about them. I'm here to talk about me." ALJD 14:20-21. As the ALJ recognized, neither the Counsel for the General Counsel nor Charging Party's own attorney called Hentz to the stand to rebut Mervin's statement. ALJD 14:24-27. Despite Hentz's statement to Mervin being unrefuted, the ALJ nonetheless failed to credit it on the grounds that it was, in the ALJ's view, "summarizing the substance" of what Hentz said. ALJD 14:29-30. But if that statement were not correct *in any material way*, Hentz presumably would have taken the stand at the behest of either of those two attorneys opposing the Veterans' Home during the hearing, if not at his own insistence. The fact that he did not speaks volumes about the overall content and character of that statement being reliable. Accordingly, the ALJ erred in discounting the weight afforded to Hentz's statement to Mervin about his intention. Hentz's statement significantly undermines any suggestion that he was attempting to act "in concert" with anyone else or for anyone's mutual aid or protection. See Manimark Corporation, 7 F.3d at 550 (no protected concerted activity where "it is apparent that [the complaining employee] did not go to [management] that day with the purpose of listing the drivers' work-related grievances," despite evidence of such discussion occurring).

10. The ALJ Made An Erroneous Credibility Determination in Concluding that Hentz's Testimony As to His Complaint of Race Discrimination to Ellis Should Be Credited Over Ellis's Testimony.

(Exception 33)

The ALJ made an erroneous credibility determination in finding Hentz's testimony as to his conversation with Regional Partner Services Manager Tammy Ellis. ALJD 28:1-5. Hentz claims he told Ellis, "Myself and some other staff members there felt like Amy and some other staff members were definitely racist. I mean it was the way they treated you was totally different." ALJD 25:41-46. Ellis, however, recalled the conversation by saying, "[Hentz] felt like there had been some racial discrimination at the facility by another partner. When we spoke about what his concerns were, and the issues that had happened, the examples he gave me didn't lead me to believe that it was racial discrimination, and when I asked for more information, he got slightly upset." ALJD 26:22-25. Ellis went on to testify that the two examples Hentz gave her were: (1) eating ice cream in an area where ice cream should not be eaten and (2) not saying good morning in the hallway—at which point Hentz became a bit aggressive and said, "I'm sorry, she didn't call me the N word, though he said the full word." ALJD 26:30-46. The ALJ based his decision that Hentz's version of events was credible, while Ellis's version was not, because Ellis' testimony as to her communications with Hentz were inconsistent with notes of her conversation with Hentz. ALJD 26: fn. 16, lines 1-5, 27:17-20 and 27:35-37.

However, Ellis never testified to taking notes of her conversation with Hentz. See Tr. 416:3-449:10. The ALJ appears to be referring to handwritten notes taken by Della Mervin during her conversation with Hentz or an Intake Report generated in connection with Hentz's call with Genice Campbell. Tr. 136:15-23 and GC H'rg Exh. 6; Tr. 44:2-6; Tr. 354:24-355:15; Resp. Hr'g Exh. 9. Upon examination by Hentz's counsel, Ellis confirmed that she (1) did not review notes

taken by Mervin, the Regional Partner Service Manager to whom Ellis assigned responsibility for handling the investigation, when those notes were made, and (2) did not review those notes *at any point* prior to Hentz's termination. Tr. 448:10-23, 352:16-353:1. It is, of course, improper and unfair for the ALJ to have discredited Ellis's testimony based on mistaken comparison of her testimony with notes taken by someone else at a different time and place—a conversation there was no evidence Ellis even participated in or reviewed. See Tr. 136:15-23; 146:2-10 (noting that the call with Ellis was only between Hentz and Ellis and was after Hentz first called PruittHealth's Corporate Office and spoke with Genice Campbell). Accordingly, the ALJ's credibility determination on this issue should be reversed.

11. The ALJ Erred in Concluding that Hentz Engaged in Protected Concerted Activity In Connection with His Communications to PruittHealth's Corporate Office and in the Corresponding Investigation Because Such Findings Are Contrary to Board Law and Other Authority and Sound Labor Board Policy.

(Exceptions 19, 27, 32, and 34-38)

i. The ALJ's Opinion Is Contrary to NLRB Case Law, Other Authority, and Sound Labor Board Policy.

The ALJ erred in his conclusion that Hentz had engaged in protected concerted activity in connection with his communications to PruittHealth's Corporate Office. The ALJ found that Hentz had engaged in such protected activity, in part, because all African-American employees would benefit from a facility free of discrimination. ALJD 33:4-8. The ALJ's reasoning is flawed.

The case of Pelton Casteel, Inc. v. N.L.R.B., 627 F.2d 23, 28 (7th Cir. 1980), is instructive. In Pelton Casteel, the General Counsel claimed that the charging party (Seward) was disciplined for engaging in protected concerted activity concerning complaints about job rates and overtime, whereas the employer responded that the charging party was disciplined for a legitimate reason. Id. The evidence showed that the charging party complained to Pelton officials about the rates

being paid to five small-casting finishers for work done on a type of casting known as an "ajax." Id. at 25. On one occasion, three or four of the employees together told the general foreman that they felt that the ajax job rates were too low. Id. There was also some evidence that the charging party complained about the rates on other jobs and that a few other employees complained individually about rates on castings, including the ajax. Id. The charging party also complained about working overtime. Id. Testimony showed that some other Pelton employees also did not like overtime and that they complained to Pelton officials. Id. Despite the evidence of such complaints by the charging party and his coworkers, the Court held as follows:

> The record does not, however, sufficiently support the ALJ's conclusion, which was affirmed by the Board, that Seward's complaints about rates and overtime in general constituted "concerted activity" protected under § 7 of the Act. As noted above, the ALJ stated without citation that an employee is "within his Section 7 rights to protest an item related to his wages and working conditions which goes to not only the person's good, but the common good of others." He then ruled that Seward's complaints in the summer of 1977 about job rates, *which according to the ALJ were made by groups of employees on several occasions*, and about overtime satisfied that standard.
>
> The ALJ's reasoning is fatally flawed. It is true that to be "concerted activities for the purpose of . . . mutual aid or protection," an employee's actions must concern a wage or working condition that affects more than that individual's interests. See NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 720 (5th Cir. 1973); Joanna Cotton Mills v. NLRB, 176 F.2d 749, 752-53 (4th Cir. 1949). The ALJ could reasonably infer here that Seward's complaints partly concerned job rates and overtime, working conditions that affected all employees. It is also necessary, however, that the employee's actions themselves at least contemplate some group activity. As was explained in Indiana Gear Works v. NLRB, 371 F.2d 273, 276 (7th Cir. 1967), in order to prove a concerted activity under Section 7 of the Act, it is necessary to demonstrate that the activity was for the purpose of inducing or preparing for group action to correct a grievance or a complaint.

Id. at 28-29 (italics and underlining added). The Court concluded that the record is insufficient, however, for a conclusion that Seward's complaints about overtime were directed at inducing collective action or that he intended any of his complaints to be "on behalf of" other employees. Id. at 29. Similarly, the Court found that the record did not support a conclusion that Seward's complaints about job rates in general were more than "individual gripes." Id.

Here, as in Pelton Casteel, the preponderance of the evidence failed to establish that employees' actions themselves contemplated some group activity. To the contrary, in discussing evidence of race-related matters, the ALJ cited Hentz's communications with another CNA (Marie Williams) who reportedly told Hentz that she "just keeps her head down, she keeps going, she doesn't really get involved." ALJD 12:5-13. Williams' passive stance belies any notion of group activity sufficient to constitute protected concerted activity. See Pelton Casteel, 627 F.2d at 28; Manimark Corp., 7 F.3d at 550-51. Stated differently, the record in this case fails to demonstrate any "group action of any kind" by Williams or any others being "intended, contemplated, or even referred to." See Indiana Gear Works, 371 F.2d at 276 (preliminary discussions might, under some circumstances, be concerted activities, but "that argument loses much of its force when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to").

In the 2004 decision of Holling Press, Inc., 343 NLRB 301 (2004), the Board ruled that the NLRA's protections did not cover an employee seeking aid from coworkers in pursuing an individual sexual harassment complaint. In Fresh & Easy Neighborhood Market, Inc., 361 NLRB No. 12 (Aug. 11, 2014), the Board overruled Holling Press, Inc., in a 3-2 decision, and held that an employee was engaged in "concerted activity" within the meaning of Section 7 of the Act when she sought assistance from her coworkers in raising a sexual harassment complaint to the company. Fresh & Easy, 316 NLRB No. 12 at *1.

Fresh & Easy is factually distinguishable from the case at hand. As an initial matter, that case pertained to a charging party's allegations of sexual harassment, whereas Hentz's statements to PruittHealth's Corporate Office pertained to alleged race discrimination. Id. at *1-2. In addition, in Fresh & Easy, the charging party's coworkers provided assistance in the form of

signing a document on her behalf. Id. at *1. Before two of those coworkers signed that document, the charging party told them that she planned to file a complaint before she asked for their assistance. Id. The third one learned of that planned action at some point during their conversation about it. Id.

Here, in contrast to the facts in Fresh & Easy, Hentz's testimony was that he obtained information from Brinson and Jeter *after* he had already contacted PruittHealth's Corporate Office, and Hentz could not recall when he spoke with Williams. Tr. 139:7-10 and 111:17-112:8. Then, once Hentz spoke with PruittHealth's Corporate Office, he made clear that, although Brinson and Jeter could be questioned about whatever they had to say, Hentz wanted to talk about his own complaint. Tr. 364:21-23, 370:1-5, 373:16-375:19, 379:14-21; 384:1-4. These facts belie any conclusion that Hentz was intending to speak on behalf of anyone other than himself when he contacted PruittHealth's Corporate Office. Any finding to the contrary is legal error and must be reversed under current Board law.

ii. For the Purpose of Presenting this Issue for the Board's Review and, If Necessary, the Courts, the Veterans' Home Contends that the ALJ Erred in Failing to Adopt the Standards for Protected Concerted Activity Articulated in Member Miscimarra's Dissent in *Fresh & Easy*, a Standard that Reasonably Applies the Act and Advances Sound Labor Policy.

(Exception 26)

The Veterans' Home recognizes that the ALJ is bound to apply current Board case law; however, for the purpose of presenting this issue for consideration by the Board and, if necessary, the courts, the Veterans' Home argues the ALJ erred in failing to adopt the standards for protected concerted activity articulated in former Member Miscimarra dissent in Fresh & Easy, a standard that better serves to apply the Act and advance sound labor policy. Stated differently, to the extent that Fresh & Easy is read broadly to render Hentz's communications to PruittHealth's Corporate

Office, to Morrison, or otherwise concerted protected activity for employees' mutual aid and protection, then Fresh & Easy should be reversed as an unreasonable application of the Act.

Former Member Miscimarra's well-reasoned dissent in Fresh & Easy supports the common sense conclusion that not every workplace matter, including those pertaining to alleged violations of other laws (such as Title VII of the Civil Rights Act of 1964), amounts to concerted protected activity under Section 7. See Fresh & Easy, 316 NLRB No. 12 at *1. The Veterans' Home summarizes its position as follows:

• As articulated by Member Miscimarra in his opinion concurring in part and dissenting in part, the majority test articulated in Fresh & Easy fails to correctly interpret Section 7's threshold requirement that protected conduct be undertaken for the "purpose" of "mutual aid or protection." The Veterans' Home incorporates such reasoning by reference.

• Section 7 states that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and statutory language must be construed as a whole, and particular words or phrases are to be understood in relation to associated words and phrases. Section 7's focus on "collective" actions, self-organization, and representation shed light on the "mutual aid or protection" element.

• The Section 7 phrase "concerted activities" contemplates more than the mere presence or involvement of two employees. As Member Miscimarra so aptly observed: "If one person is a witness to somebody else's car crash, and if they both have a shared interest in avoiding such accidents, this does not mean they have engaged in 'concerted' activity. Rather, 'concerted'

activity takes place, within the meaning of Section 7, **only if the conduct involves or contemplates a joint endeavor to be 'done or performed together or in cooperation.'"**

• Activity involving two or more employees consisting of **"mere talk" must, in order to have Section 7 protection, "be talk looking toward group action."** "If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere 'griping.'"

• Moreover, the expansive reading of the Act's protections in Fresh & Easy, even if well-intended, will produce adverse consequences in circumstances where the Act should not apply, thereby undermining employers' interests in regards to sex harassment, race discrimination and other types of complaints and other non-NLRA protection available to employees.

• As well-articulated by Member Johnson in his dissenting opinion, Section 7 does not give the Board the authority to act as an "uberagency" without due regard to the enforcement processes established by other laws and agencies.

Here, as in Fresh & Easy, although the Charging Party (Hentz) obtained information from his coworkers which pertained to alleged discrimination, the preponderance of the evidence failed to show any objective indication that those coworkers were aligned with any announced, proposed plan to contact PruittHealth's Corporate Office to report such matters or that any of those individuals viewed Hentz as their representative or spokesperson as to any type of joint or group complaint or that they had any particular interest in the outcome of that report (Hentz himself offered no testimony as to any follow-up discussions he had with Brinson or Jeter after having contacted PruittHealth's Corporate Office). These findings are further supported by the evidence

that (1) Hentz had already called PruittHealth's Corporate Office by the time he spoke with Brinson and Jeter (Tr. 139:7-10), and (2) Brinson and Jeter (two individuals Hentz identified by name during the investigation into the complaint he raised through PruittHealth's Corporate Office) provided no testimony as to alleged discrimination in the facility or any discussions they had with Hentz pertaining to race-related issues. GC Hr'g Exh. 6. Thus, the record is silent on whether any information that was discussed with Hentz or others reflects the honest (let alone reasonable) beliefs of either Brinson or Jeter. See City Disposal Systems, 465 U.S. at 840. Notably, Brinson, when contacted by Mervin, advised at the time (completely contrary to Hentz's representations at the hearing before the ALJ) that she (Brinson) believed Ferguson needed leadership training and not that she made decisions based on race. Tr. 361:10-25. Jeter did not responded to multiple attempts by Mervin to reach her. Tr. 364:9-17. Accordingly, the preponderance of the record evidence fails to establish that Hentz was speaking on Jeter's behalf when Jeter herself would not even participate in an interview involving the matter. These facts reveal that Hentz was not acting in "concert" with anyone for any "mutual" purpose when those words are accorded their "commonly accepted meanings," including "together; jointly" or an "agreement of two or more individuals in a design or plan; combined action; accord or harmony;" and "contrived or arranged by agreement; planned or devised together; done or performed together in cooperation." See Fresh & Easy, 316 NLRB No. 12 (Miscimarra, dissenting).

Here, as in Fresh & Easy, there was no communication from Hentz's coworkers amounting to either a petition or a joint complaint (in other words, any evidence to signify that they adopted and sought to advance the viewpoints being articulated by the individual who purported to raise them). See id. Here, as in Fresh & Easy, there was no evidence that any of Hentz's coworkers provided him with meaningful or substantive information based on his "planned future action."

See id. As Hentz testified, Horton "mostly just listened" and was "very careful not to say too much." Tr. 140:13-16. Horton claimed at the hearing to believe that Morrison (as opposed to Ferguson) had some prejudice (Tr. 301:17-301:20),[10] but no evidence was elicited to show that Horton expressed that view to Hentz during her employment with the Veterans' Home. Tr. 271:1-306:13. Instead, the only testimony pertaining to the viewpoint Horton expressed about alleged race discrimination *during her employment with the Veterans' Home* was found in her statement to Morrison that she did not think he was racist. Tr. 302:10-303:1. Here, as in Fresh & Easy, there was no activity that anyone identified to be "done or performed together or in cooperation" and there was no "talk" looking toward "group action." See Fresh & Easy, 316 NLRB No. 12 (Miscimarra, dissenting). Accordingly, the adoption of Member Miscimarra's dissenting opinion in Fresh & Easy yields the conclusion that Hentz never engaged in any protected concerted activity within the meaning of Section 7 of the Act, and any finding to the contrary by the ALJ is legal error and must be reversed.

[10] Horton's belief in mid-September 2017 about Morrison is not sufficient evidentiary grounds from which to conclude that anyone else's concerns about alleged discrimination by the former Activities Director Amy Ferguson (the manager about whom Hentz complained to PruittHealth's Corporate Office) (Resp. Hr'g Exh. 9; Tr. 356:9-23) or anyone else was reasonably or sincerely held when those concerns were expressed. See City Disposal Systems, 465 U.S. at 840.

B. THE ALJ ERRED IN CONCLUDING THAT THE VETERANS' HOME VIOLATED SECTION 8(A)(1) OF THE ACT BY ISSUING A FINAL WRITTEN WARNING, ALLEGEDLY DEMOTING, AND DISCHARGING HENTZ BECAUSE THE ALJ IMPROPERLY ANALYZED THE EMPLOYER'S COLLECTIVE, NOT INDIVIDUALIZED, KNOWLEDGE OF THE ALLEGED PROTECTED ACTIVITY.

(Exceptions 34-38)

1. The ALJ's Opinion Fails to Analyze the Extent to Which Morrison Knew of Each Alleged Instance of Protected Activity that Was Not Directed to Him and the ALJ's Analysis is Based on Legal Error.

The ALJ erred in concluding that the Veterans' Home violated Section 8(a)(1) of the Act by issuing a final written warning, allegedly demoting, and discharging Hentz because the ALJ failed to make critical findings on which instances of alleged protected activity (some of which was made to individuals other than Morrison) Morrison knew about. Rather than make this determination, the ALJ reached a blanket conclusion that, because concerns were expressed to "management," Morrison was aware of them. ALJD 33:10-14. The ALJ's failure to make the necessary findings as to which specific instances of alleged protected activity Morrison knew about amounts to legal error. See id.; see also Board Rule 101.11(a); G4S Secure Solutions (USA), Inc., 364 NLRB No. 92, 2016 WL 4524112, at *4 (2016), enf. G4S Secure Solutions v. NLRB, 707 F. App'x 610 (11th Cir. Sept. 1, 2017) ("When an employer affirmatively establishes a basis for negating the imputation of knowledge from a manager or supervisor to a decision-maker, the Board will not impute such knowledge.").

2. The Preponderance Of the Evidence Does Not Establish that Morrison Knew Hentz's Communications with PruittHealth's Corporate Office or Otherwise Involved Matters, the Substance of Which Ultimately Falls Within Section 7 of the NLRA, and the ALJ Made Erroneous Credibility Determinations In Concluding that Hentz Told Morrison He Would Be Contacting PruittHealth's Corporate Office.

The preponderance of the evidence at the hearing established (as Morrison testified) that, prior to December 5, 2016, Morrison had no knowledge of what information, if any, Hentz reported to PruittHealth's Corporate Office or what information PruittHealth provided in response, and Morrison never understood Hentz to have raised any concerns on behalf of anyone other than himself. Tr. 556:2-557:15. Such testimony comports with Hentz's own testimony that his conversations with Morrison about the matters he now claims constitute protected concerted activity involving the so-called "concerns" held by others ("concerns" that the General Counsel has not established were honestly or reasonably held) were, back then, communicated through the use of "very vague terms." Tr. 242:25-243:1. Here, Morrison's testimony that he did not know what information Hentz provided to PruittHealth's Corporate Office or what information PruittHealth provided in response, was supported by the testimony of both Regional Partner Services Managers Tammy Ellis and Della Mervin. Ellis testified as follows:

Q. Did you discuss the investigation with Mr. Morrison?

A. No, I did not.

Q. Why did you not discuss the investigation with Mr. Morrison?

A. There was no need to.

Q. Do you know whether Ms. Mervin discussed her investigation with Mr. Morrison?

A. I do not have information on that.

Tr. 425:19-426:1.

Similarly, Mervin testified that she asked Morrison only general questions pertaining to the matters raised in Hentz's complaint about Ferguson. Mervin testified as follows:

> Q. And what do you recall saying to Mr. Morrison?
>
> A. I asked him basically some very general questions, nothing too specific. I asked him about the staffing and scheduling, asked him if he had any concerns. You know, we talked about those kinds of issues, nothing super specific.
>
> Q. Did you ever explain to Mr. Morrison why you were asking those questions?
>
> A. Not directly.
>
> Q. Did you ever explain to Mr. Morrison that you were investigating a concern raised by Ricky Hentz?
>
> A. Mr. Morrison knew I was there to investigate a concern. I don't think he had any specific information about what the concern was.
>
> Q. That was [based] on information that you had shared with him?
>
> A. Right.

Tr. 365:9-23. Ms. Mervin further testified:

> Q. Who, if anyone, did you discuss your investigation with?
>
> A. Tammy Ellis and Brandon Dhande.
>
> Q. Anyone else?
>
> A. No.
>
> Q. Why did you not discuss . . . your investigation in more detail with Mr. Morrison?
>
> A. That building is not part of my normal territory. The relationship still needed to be with Ms. Ellis. She asked me to provide some assistance, but I still wanted the relationship to be between her and her building.

Tr. 367:18-368:10. The ALJ failed to analyze this critical, credible, and contradictory evidence, in which three witnesses are all corroborating each other on the same point: Morrison's lack of knowledge of the content of the investigation.

For the reasons explained in Section IV.A.1 (*supra*), the General Counsel's witnesses have provided conflicting information on whether Hentz told Morrison directly that he would be contacting PruittHealth's Corporate Office before he did so. If that statement had, in fact, been made, then none of the remaining testimony on this issue provided by Horton or Hentz would make any sense. See Section IV.A.1 (*supra*). Even if Morrison could have somehow speculated that the matter for whatever reason pertained to Hentz, the preponderance of the evidence still would not show that Morrison knew the matter pertained to any concern raised by Hentz on behalf of himself ***and another individual*** on any underlying matter that ultimately falls within the scope of Section 7 activity.[11] Neither the alleged statement about being "tired of Ricky's shit" (which Morrison did not make: see Tr. 565:20-21) nor Horton's testimony about her communications with Morrison show any knowledge on Morrison's part of their being any type of "group concern" or "group complaint" (as opposed to, at best, an individualized gripe) made to PruittHealth's Corporate Office. In fact, even if Horton's testimony on this issue were found credible by the Board (which it should not be), that testimony serves only to confirm that Morrison did not understand what was going on with respect to the presence of PruittHealth's Corporate Office at the Black Mountain facility. See Tr. 279:8-16 (Horton testifying that Morrison said someone from corporate would be at the building, but not discussing the reason for or nature of the visit); Tr. 280:3-281:12 (Morrison reportedly asking Horton if she knew what was going on); Tr. 283:5-6 (Horton testifying, "[Morrison] told me that Ricky wouldn't tell him nothing."). The issue here is not whether Morrison had any knowledge of Hentz making any complaint *at all*. The issue,

[11] The Veterans' Home does not contend that Morrison was ignorant of the law or that ignorance of the law would somehow excuse anything. Rather, there is a difference between a manager knowing that a complaint is held by one person as opposed to more than one, let alone whether any such complaint falls, *in substance*, within the ambit of Section 7 of the NLRA. The General Counsel failed to establish any such knowledge through the preponderance of the evidence.

instead, is whether Morrison knew Hentz had raised the type of group complaint or group concern the substance of which, ultimately, falls within the scope of activities protected by Section 7 of the NLRA.[12] The preponderance of the evidence, including the evidence presented by the General Counsel, overwhelmingly shows he did not.

V. CONCLUSION

The record evidence establishes that the General Counsel did not satisfy its burden.[13] As explained, the ALJ made numerous reversible errors in concluding to the contrary. For these and all of the reasons discussed above, Respondent's exceptions should be accepted, the findings and conclusions of the ALJ to which Respondent excepted should be overturned, the Board should conclude that no violations of the Act occurred with respect to Hentz's discipline, alleged demotion and termination, and all such allegations in the Complaint should be dismissed in their entirety with prejudice, and Hentz's discipline, reassignment from the position of Scheduler/CNA to CNA, and termination should be allowed to stand.

[12] To the extent that any Board case law or other authority suggests any proposition other than the one immediately recited in the text preceding this footnote, such conclusions should be reversed and invalidated as an unreasonable application of the NLRA and inconsistent with sound labor board policy.

[13] The ALJ's Opinion contains more improper and unsupported inferences and proposed conclusions and legal errors than those referenced in this Brief or in the Veterans' Home's Exceptions, which are being filed contemporaneously with this document. Some of those proposed findings pertained to matters that were neither fully litigated nor directly relevant to the NLRA analysis before the ALJ and some were made in violation of evidentiary rules set forth in the Federal Rules of Evidence and other accepted standards that would govern a court proceeding. For example, the ALJ concluded that certain facts were true, in part, because Hentz was an "outgoing, people-oriented person," whereas Morrison was "more military." ALJD p. 33 at fn. 21 (lines 2-3). The applicable page limitations do not support a full discussion of each such additional error, and the Veterans' Home reserves its right to challenge any such findings in any proceeding not arising under the NLRA. Accordingly, the Veterans' Home's arguments for reversal of the ALJ's decision are as articulated above. The Veterans' Home notes, however, that Morrison's past service in the U.S. military, standing alone, should in no way reflect negatively on him as a witness or manager.

Respectfully submitted this 31st day of May, 2018.

/s/ Jana. L. Korhonen
Jana L. Korhonen, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
One Ninety One Peachtree Tower
191 Peachtree Street N.E, Suite 4800
Atlanta, Georgia 30303
Telephone: (404) 881-1300
Facsimile: (404) 870-1732

Attorney for Respondent
Pruitt-Health Veteran Services-North Carolina, Inc.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PruittHealth Veteran Services – North Carolina, Inc., **Respondent,** **and** **Ricky Edward Hentz, an Individual,** **Petitioner.**	**Case: 10-CA-191492**

CERTIFICATE OF SERVICE

I hereby certify that on this the 31st day of May, 2018, date I have served a copy of the foregoing *Respondent's Brief in Support of Exceptions to Administrative Law Judge's Decision* on counsel for Ricky Edward Hentz and General Counsel, by depositing same in the U.S. Mail, postage prepaid, and addressed as follows, as well as via Electronic Mail:

Joel R. White, Esq.
Counsel for General Counsel
National Labor Relations Board, Subregion 11
4035 University Parkway, Suite 200
Winston-Salem, NC 27106-3275
joel.white@nlrb.gov

Glen Shults, Esq.
Linda Vespereny, Esq.
Law Office of Glen C. Shults
959 Merrimon Avenue – Suite 204
P. O. Box 18687
Asheville, NC 28814
shultslaw@bellsouth.net

/s/Jana L. Korhonen
Jana L. Korhonen

34284105.1